

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott
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Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of a Further Commission
Investigation of Avoided Cost Discount of
U S WEST Communications (now Qwest)

ISSUE DATE: December 11, 2001

DOCKET NO. P-999/CI-99-776

ORDER ACCEPTING THE PROPOSED
RESOLUTION

PROCEDURAL HISTORY

On December 2, 1996 the Commission issued its ORDER RESOLVING ARBITRATION ISSUES AND INITIATING A US WEST COST PROCEEDING arising from a consolidated arbitration proceeding¹ under the Federal Telecommunication Act of 1996(The Act).² In that Order, the Commission resolved numerous disputed issues including the wholesale discount at which USWest Communications Inc.(USWC) must offer telecommunications services for resale to its competitors. The Commission established a 21.5% avoided cost discount applicable to retail services resold by USWC. The Commission calculated the wholesale discount by dividing the total avoided costs it calculated for USWC by USWC total expenses.

On March 17, 1997, the Commission issued its ORDER RESOLVING ISSUES AFTER RECONSIDERATION AND APPROVING CONTRACT,³ approving identical USWC-AT&T and USWC-MCImetro Interconnection Agreements, subject to modifications contained in the Order.

¹In the Matter of the Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc. and MFS Communications Company for Arbitration with US WEST Communications, Inc. Pursuant to Section 252 (b) of the Federal Telecommunications Act of 1996. Docket No. P-442, 421/M-96-855; P-5321, 421/M-96-909; P-3167, 421/M-96-729 Consolidated.

² 47 U.S.C. § 252(b)

³ See footnote 1, above

On March 17, 1997, the Commission also issued its ORDER APPROVING CONTRACT which approved the USWC-MFS Agreement subject to modifications contained in the Order.⁴

On April 15, 1997, USWC filed a complaint in United States District Court, District of Minnesota alleging, inter alia, that the 21.5% wholesale discount rate adopted by the Commission was in error and inconsistent with Section 252(d) of the Telecommunications Act.

On March 31, 1999 United States District Judge Ann Montgomery remanded to the Commission the issue of the calculation of avoided costs. The Court directed the Commission to use retail rates as the basis for the wholesale resale discount offered by USWC to interconnecting Competitive Local Exchange Companies (CLECs) pursuant to the Act and FCC requirements.

The Commission opened Docket number P-999/CI-99-776, In the Matter of a Further Commission Investigation of Avoided Cost Discount of USWC, to investigate further the calculation of USWC's avoided cost discount. On June 7, 1999 the Commission issued a notice soliciting comments in this matter. Due to a service error, an additional comment period was established until July 29, 1999.

Comments were submitted by the Minnesota Department of Public Service (now the Department of Commerce) (DOC) on June 18, 1999, recommending that the Commission adopt the 17.66% wholesale discount recommended by the Administrative Law Judge (ALJ) arbitration panel in its report issued November 5, 1996 in the consolidated arbitration proceeding.

Comments were filed by USWC on June 28, 1999 also asking the Commission to adopt the 17.66% wholesale discount.

Certain competitive local exchange carriers (CLECs) including InfoTel Communications, Inc., US Link, Inc., Ottertail Telecom, LLC, and Tekstar Communications, Inc. (Certain CLECs), filed comments on July 29, 1999, asking the Commission to allow them to adopt the 21.5% wholesale discount rate the Certain CLECs assert USWC agreed to in the MFS interconnection agreement. Further, the Certain CLECs requested, in the alternative, that the Commission implement a contested case proceeding to revise the 21.5% wholesale discount.

Reply comments were filed by USWC on August 18, 1999 stating, inter alia, that it did not voluntarily agree to the 21.5% wholesale discount in the MFS agreement and that it had appealed that finding by Judge Montgomery to the Eighth Circuit Court of Appeals.

On October 15, 1999 USWC and Certain CLECs filed a proposed resolution of this matter. The terms of the proposed resolution included:

- The 21.5% wholesale discount would apply to services resold prior to September 1, 1999.
- Services resold on and after September 1, 1999 would be at the wholesale discount rate of 17.66%.

⁴ Order in Docket No. P-3167,421/M-96-729, In the Matter of MFS Communications Company's Petition for Arbitration with US WEST Communications, Inc. Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996.

- The wholesale discount rate of 17.66% would apply to all USWC interconnection agreements in Minnesota through March 17, 2002.

On October 28, 1999, the Commission issued a notice of comment period regarding the proposed resolution. Comments were filed on November 18, 1999 by the DOC and on November 19, 1999 by Crystal Communications Inc. Both recommended acceptance of the proposed resolution.

The Commission met on January 11, 2000 to consider the proposed resolution and voted to approve the proposed resolution between USWC and Certain CLECs. No Order has been issued.

The Commission had placed the docket on the Commission Agenda for the February 8, 2000 meeting to address whether, on its own motion, it should reconsider the January 11, 2000 decision as being beyond the scope of the federal district court remand directive and inconsistent with the federal district court's order. At the request of USWC, the matter was pulled from that agenda to enable USWC to negotiate a resolution with other CLECs.

In August 2000, after Qwest acquired USWC, Qwest withdrew its appeal of all issues in four interconnection agreement appeals it had taken from proceedings before Judge Montgomery in federal district court. This included the finding that it had voluntarily agreed to the wholesale discount of 21.5% in the MFS agreement.

In July of 2001, the Commission began receiving complaints from reseller CLECs that Qwest had begun charging them the 17.66% resale discount and had back-billed the difference between the 17.66% discount rate and the 21.5% discount rate to September 1999.

On November 20, 2001, the matter came before the Commission.⁵

FINDINGS AND CONCLUSIONS

I. Background

On January 11, 2000, the Commission voted to approve a Proposed Resolution between USWC and Certain CLECs dated October, 15, 1999 as a resolution of the remand order by federal district Judge Montgomery.⁶ The proposed settlement would have made a binding change in the wholesale discount rate for all USWC interconnection agreements in Minnesota, making the 17.66% discount apply to all services resold after September 1, 1999.

The issue remanded by the federal district court, however, only applied to the USWC interconnection agreements with AT&T and MCI Metro, and to all CLECs that have adopted either of these two interconnection agreements or have adopted the avoided cost discount from either of these agreements in their contract. The remanded issue did not apply to the MFS interconnection agreement with USWC because the district court had held that USWC and MFS voluntarily agreed

⁵ Commissioner Reha recused herself from participation in this decision.

⁶ US West Communications, Inc. v. Minnesota Public Utilities Commission et al., MEMORANDUM OPINION AND ORDER, Civ. 97-913, March 31, 1999 (D. Minn).

to the 21.5% discount for that agreement.⁷ Other CLECs that had adopted the MFS agreement would also be entitled to the 21.5% discount.

At the time of the January 11, 2000 Commission meeting, the issue of whether USWC and MFS voluntarily agreed to the 21.5% discount was on remand to the Eighth Circuit Court of Appeals. In August 2000 this appeal was withdrawn by Qwest after Qwest acquired USWC.

II. The November 19, 2001 Proposed Resolution Between Qwest and Certain CLECS

This Agreement between Qwest and Certain CLECS is premised on the Commission's adopting a 17.66% wholesale discount for the period beginning on February 8, 2000 for all Qwest interconnection agreements in Minnesota, other than the MFS Interconnection Agreement and parties that have opted into that Agreement on or before February 8, 2000.

The parties agreed that the 21.5% wholesale discount would apply to services resold prior to February 8, 2000. Services resold after that date would be subject to the 17.66% discount rate that was recommended by the ALJ panel in the arbitration proceeding.⁸ Effective February 8, 2000, the 17.66% wholesale discount rate would be substituted for the 21.5% wholesale discount rate in Qwest's Minnesota interconnection agreements.

III. The Evergreen Contract Issue

The interconnection agreement between USWC and MFS expired in August 1999. Services, however, continue to be provided under the terms of this interconnection agreement at the 21.5% wholesale discount pursuant to an evergreen clause in the contract. The issue of whether other CLECs may opt into an interconnection agreement after it has expired but while services continue to be provided is not currently before the Commission and is not addressed in this Order.

IV. Parties Responses to the Proposed Resolution⁹

A. New Access Communications LLC (New Access)

New Access, a new CLEC providing residential resale service in Minnesota, argued that the Arbitrator's Report suggesting the 17.66% discount rate was issued over five years ago and that much has happened in the last five years that would affect wholesale discount calculations. For this reason, New Access requested that the Commission enter into a new wholesale cost study and, until such study is completed, set an interim wholesale discount rate of 25%.

⁷ Ibid, footnote 25.

⁸ See Footnote 1, above. Arbitrators Report issued November 5, 1996.

⁹ Responses from the DOC and the Residential and Small Business Utilities Division of the Office of the Attorney General (RUD-OAG) were presented orally before the Commission on November 20, 2001. New Access Communications LLC (New Access) filed written comments as well as appearing before the Commission at the meeting.

In the alternative, New Access argued that the wholesale discount rate should be at a minimum 21.5%, which is the rate Qwest agreed to in the MFS contract. It requested that this rate be applied retroactively to all Qwest billings since August 1, 2000.

B. DOC

The DOC recommended that the Proposed Resolution be adopted but that the Commission clarify that, by adopting this Resolution, it was not accepting Qwest's position on the evergreen contract issue or making any decision on that issue.

The DOC further indicated it would support a new look at wholesale discount rates but stated concern whether there was support for this from affected parties. It recommended that the Commission put out a Notice for Comments on opening a new docket to determine if there was interest.

C. RUD-OAG

The RUD-OAG stated it would support opening a new cost docket as it considers this important for new CLECs. It indicated it would support anyone who files a petition to do so but the RUD-OAG would not file such a petition on its own.

D. Qwest

Qwest argued that the Commission should accept the November 19, 2001 Proposed Resolution, which adopts the 17.66% wholesale discount for all Qwest interconnection agreements, other than the MFS Interconnection agreement and parties that have opted into that agreement on or before February 8, 2000, as an appropriate resolution of this docket.

Qwest also stated at the hearing that the Proposed Resolution does not address the evergreen contract issue and that Qwest had no intention of addressing this issue in the Proposed Resolution. Qwest concurred that adoption of the Proposed Resolution would not be taken as a resolution of the evergreen contract issue.

E. Certain CLECs

The Certain CLECs also requested that the Commission adopt the Proposed Resolution.

V. Commission Action

A. On the Proposed Resolution of November 19, 2001

The Commission is persuaded that the Proposed Resolution negotiated between Certain CLECs and Qwest, which adopts the 17.66% wholesale discount rate for all Qwest interconnection agreements in Minnesota beginning on February 8, 2000, with the exception of the Qwest MFS interconnection agreement, is in compliance with law and the remand Order and should be adopted as a reasonable resolution of this docket. It is supported by record evidence and is in fact the discount rate originally recommended by the ALJ arbitration panel.

Further, the Commission finds that this Proposed Resolution recognizes the continuing 21.5% wholesale discount rate that is part of the Qwest interconnection agreement with MFS, and the CLECs that opted into this agreement on or before February 8, 2000.

The Commission clarifies that, by accepting this Proposed Resolution, it is in no way recognizing or accepting that there is any resolution of the issue of the ability of CLECs to opt into the MFS contract after the contract has expired but services are still being provided under the terms of the contract. This issue is not currently before the Commission and the Commission makes no decision on it herein. The Commission also relies on Qwest's assurances that this Proposed Resolution is not intended to address this issue, nor is it Qwest's intention to rely on the acceptance of this Proposed Resolution as a resolution of this issue.

B. On the Issue of Opening a New Docket to Determine a new Avoided Cost Pricing Number

The Commission, although it recognizes that the data used to determine the wholesale discount rate is over five years old, also recognizes that regulatory and stakeholder resources are limited and consideration must be given to the allocation of its resources. At this time there has been no evidence indicating there is significant change to the underlying data used to determine the wholesale discount rates, nor have any CLECs filed petitions seeking a new avoided cost docket. For these reasons, the Commission agrees with the DOC that it is reasonable to determine whether there is interest before opening a new docket to determine a new wholesale discount. To this end, the Commission will send out a Notice/Request for Comment regarding the appropriateness of the Commission opening a new docket for that purpose.

ORDER

1. The Commission adopts the Proposed Resolution Between Qwest and Certain CLECs dated November 19, 2001. The acceptance of this Resolution by the Commission is not to be deemed a resolution of the evergreen contract issue.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

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